

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

In re Application of:

Rexroad, John

Serial No.: 10/727,927

Filed: December 3, 2003

For: Sheathed Shrink Net and Support Assembly

Technology Center: 3600

Group Art Unit: 3634

Examiner: Colleen Quinn

Appeal No.

APPELLANT'S BRIEF

This is an appeal from the final rejection of the Examiner dated November 30, 2006 rejecting Claims 12-19. The requisite fee set forth in 37 CFR §41.20(b)(2) is filed herewith.

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| 35 U.S.C. §103 | passim |
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REAL PARTY IN INTEREST (37 C.F.R. 41.37(C)(1)(i))

John Rexroad, an individual residing in the state of Connecticut, is the real party in interest.

RELATED APPEALS AND INTERFERENCES (37 C.F.R. 41.37(C)(1)(ii))

There are no related appeals or interferences.

STATUS OF CLAIMS (37 C.F.R. 41.37(C)(1)(iii))

The current status of the claims is as follows:

Allowed claims – none

Objected claims – none

Rejected claims – 12-19

Claims 12-19 are involved in this appeal.

STATUS OF AMENDMENTS (37 C.F.R. 41.37(C)(1)(iv))

After final, Applicant did not amend any currently pending claims.

SUMMARY OF CLAIMED SUBJECT MATTER (37 C.F.R. 41.37(C)(1)(v))

As set forth in Claim 12, the present invention resides in a method of supporting a net along a support member (Spec., p. 3, lines 22-23) comprising the steps of: providing a support member having a generally elongated extent and having a given diameter (Spec., p. 3, lines 23-24); providing a plurality of lock fasteners which have a free end which connects to an opposite end to create a variably constraining diameter when pulled tight (Spec. p. 3, lines 24-26); providing a net having a border that surrounds the perimeter of the net with weft and warp members extending generally perpendicularly thereto to define spaces therebetween (Spec. p. 3, lines 26-27); stretching said border along said support member and fastening said border member to said support member using said lock fasteners by wrapping said fastener about said net border and said support member in said spacing and pulling the free end of said fastener through a locking mechanism to lock the fastener in place (Spec., p. 3, lines 28-31) (additional support for claim 12 is found in the claim as originally filed).

As set forth in claim 13, the method of claim 12 is further characterized by providing a net (Spec., p. 10, lines 24-30; Figs. 6-7 reference numbers 26 and 26') having a border (Spec., p. 10, lines 24-25; Figs. 6-7 reference numbers 28 and 28') which has a generally rectangular shape (Spec., p. 10, lines 25-28; Figs. 6-7 and 9) defined by first and second spaced apart long sides extending parallel to one another (Spec., p. 10, lines 25-28) and first and second short sides each connected to and extending generally perpendicular to the first and second long sides and extending parallel to one another (Spec., p. 10, lines 25-28) and locating the long sides of said border flat against said support member (Spec., p. 11, lines 1-7) and securing said border to said support member with said lock fasteners (Spec., p. 11, lines 3-4) (additional support for claim 13 is found in the claim as originally filed).

As set forth in claim 14, the method of claim 13 is further characterized by providing a rubberized sleeve about said lock fasteners and clamping said border about said support element in the region of said rubberized sleeve (Spec. p. 11, lines 20-22) (additional support for claim 14 is found in the claim as originally filed).

As set forth in claim 15, the method of claim 14 is further characterized by locking said net to said support member using a one way latch mechanism provided as part of said lock fastener (Spec., p. 11, lines 13-16) (additional support for claim 15 is found in the claim as originally filed).

As set forth in claim 16, the present invention resides in an apparatus for supporting a net along a support member (Spec., p. 3, lines 22-23) comprising a support member having a generally elongated extent and having a given diameter (Spec., p. 3, lines 23-24); a plurality of lock fasteners which have a free end which connects to an opposite end to create a variably constraining diameter when pulled tight (Spec. p. 3, lines 24-26); a net having a border that surrounds the perimeter of the net with warp and weft members extending generally perpendicularly thereto to define spaces therebetween (Spec. p. 3, lines 26-27); said border being stretched along said support member and fastened to said support member using said lock fasteners by wrapping said fasteners about said net border and said support member in said spaces and pulling the free end of said fastener through a locking mechanism to lock the fastener in place with the border and the support member (Spec., p. 3, lines 28-31) (additional support for claim 16 is found in the claim as originally filed).

As set forth in claim 17, the apparatus as defined in claim 16 is further characterized by said net having a border (Spec., p. 10, lines 24-30; Figs. 6-7 and 9 reference numbers 26, 26', 28, and 28") which has a generally rectangular shape (Spec., p. 10, lines 25-28; Figs. 6-7

and 9) defined by first and second spaced apart long sides extending parallel to one another (Spec., p. 10, lines 25-28) and first and second short sides each connected to and extending generally perpendicular to the first and second long sides and extending parallel to one another (Spec., p. 10, lines 25-28) and locating the long sides of said border flat against said support member (Spec., p. 11, lines 1-3) and securing said border to said support member with said lock fasteners (Spec., p. 11, lines 3-4) (additional support for claim 17 is found in the claim as originally filed).

As set forth in claim 18, the apparatus as defined in claim 17 is further characterized by a rubberized sleeve being disposed about said lock fasteners and said border being clamped about said support element in the region of said rubberized sleeve (Spec. p. 11, lines 20-22) (additional support for claim 18 is found in the claim as originally filed).

As set forth in claim 19, the apparatus as defined in claim 18 is further characterized by locking said net to said support member using a one way latch mechanism provided as part of said lock fastener (Spec., p. 11, lines 13-16) (additional support for claim 19 is found in the claim as originally filed).

GROUND OF REJECTION TO BE REVIEWED ON APPEAL
(37 C.F.R. 41.37(C)(1)(vi))

Whether claims 12-19 are unpatentable under 35 U.S.C. §103(a) over U.S. Pat. No. 6,098,750 issued to *Reynolds* et al. (“*Reynolds*”) in view of U.S. Pat. No. 6,138,327 issued to *Powell* et al. (“*Powell*”).

ARGUMENT (37 C.F.R. 41.37(C)(1)(vii))

REJECTION UNDER 35 U.S.C. §103(a) OVER U.S. PAT. NO. 6,098,750 ISSUED TO REYNOLDS IN VIEW OF U.S. PAT. NO. 6,138,327 ISSUED TO POWELL.

1. *The Examiner Failed To Make Out a Prima Facie Case Of Obviousness To Support a Rejection Under 35 U.S.C. §103 Of Any Of Applicant's Claims*

The Examiner has failed to establish a prima facie case of obviousness. When examining a patent application, the Examiner has the initial burden of factually supporting a prima facie conclusion of obviousness. *See, In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992). Additionally, when rejecting claims under 35 U.S.C. §103, it is incumbent upon the Examiner to establish a factual basis to support the legal conclusion of obviousness. *See, In re Fine*, 837 F.2d 1071, 1073 (Fed. Cir. 1988). In so doing, the Examiner must make the factual determinations set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966). Specifically, the Examiner must (1) determine the scope and content of the prior art; (2) determine the differences between the prior art and the claims at issue; and (3) determine the level of ordinary skill in the art. *See, Id.* In addition to these factual determinations, the Examiner must also provide “some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006). Moreover, the analysis supporting obviousness should be made explicit and should “identify a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements” in the manner claimed. *See, KSR Int’l Co. v. Teleflex*, No. 04-1350, slip op. at 15 (U.S. 4-30-2007).

Only if the Examiner makes a prima facie case of obviousness, does the burden shift to the Applicant of providing evidence of non-obviousness. *See, In re Oetiker*, 977 F.2d at 1445. Obviousness is then determined based on the evidence as a whole and the persuasiveness of the arguments. *See, Id.* Here, the Applicant respectfully asserts that the Examiner has failed to meet the evidentiary burden.

A. Claims 12-19

With respect to claims 12-19, the Examiner has indicated on pages 2-3 of the final office action that “it would have been obvious to one or (sic) ordinary skill, (sic) to use the straps provided by Powell, (sic) to connect the net to the support member provided by Reynolds, (sic) in order to offer a strap that locks to a given diameter and provides additional gripping support with the rubberized sleeve.” (Examiner’s Final Office Action p. 2-3). The Applicant respectfully asserts that the Examiner provided no rationale to support a legal conclusion of obviousness.

Specifically, the Examiner’s reasoning to combine *Reynolds* and *Powell* to render Applicant’s invention obvious is unclear from the office action. The conclusory, one sentence statement of the Examiner regarding the combination of the *Reynolds* and *Powell* patents does not provide the Applicant with an understanding of why a person of ordinary skill in the art would look to a safety system as disclosed in *Reynolds* and a flexible strap arrangement disclosed in *Powell* to create Applicant’s invention.

Moreover, the Supreme Court has stated that the fact finder should be aware of the distortion caused by hindsight bias and must be cautious of arguments that rely upon ex post reasoning. *See, KSR Int’l Co.*, No. 04-1350 at 17. Here, the Examiner has impermissibly used hindsight to find Applicant’s invention obvious under 35 U.S.C. §103(a) and has used the Applicant’s claims as a roadmap for formulating the obviousness rejection.

Specifically, the Examiner has indicated on page 3 of the final office action that it would have been obvious to use the straps provided by *Powell* in order to offer a strap that locks to a given diameter and provides additional gripping support with the rubberized sleeve. This reasoning improperly uses Applicant’s claims as a roadmap for concluding that it would have been obvious to use the straps disclosed by *Powell* with the net system disclosed by *Reynolds* to create Applicant’s invention.

The problem or deficiency in *Reynolds* that the Examiner raises is the need to connect the net to the support member with a strap that locks to a given diameter and provides additional gripping support with the rubberized sleeve. The Examiner asserts that *Powell* solves this problem. However, the safety system disclosed in *Reynolds* requires the use of a fastener such as a spring snap link, as opposed to a lock fastener, because the safety net of *Reynolds* slides along the vertical posts (20) and (30) to a position lower than a mezzanine

shelf. (*Reynolds* Col. 2, lines 62-66). A spring snap link fastener is shown below in Fig. 1. The spring snap link fastener is made of metal, includes a lever arm that opens using a spring, and has two curved ends. The spring snap link fastener is not designed to permanently lock two items together. Rather, as in the *Reynolds* invention, it allows two items to move relative to each other while still being fastened together.

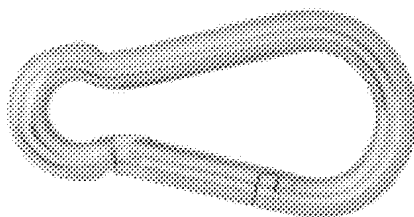


FIG. 1

In contrast, the fastener disclosed in *Powell* is shown below in Fig. 2. As stated by the Examiner, the *Powell* fastener locks to a given diameter and provides additional gripping support with its rubberized sleeve. This type of lock fastener is used to bundle items together. (*Powell*, Col. 1, lines 5-7). However, this type of fastener does not allow the items bundled together move relative to each other. Rather, this fastener includes a one-way, pull-out resistant locking mechanism that non-releasably secures items together and does not allow movement. Thus, a person of ordinary skill in the art at the time of the invention would not have reasonably looked to combine the lock fastener of *Powell* with the safety net system of *Reynolds*. As such, the Examiner has impermissibly used the Applicant's claims as a roadmap in formulating the 35 U.S.C. §103(a) rejection.

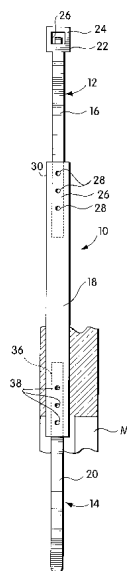


FIG. 2

Based on the above information and evidence, the Applicant respectfully asserts that the Examiner has not provided a prima facie case of obviousness with respect to the 35 U.S.C. §103(a) rejection. Therefore, Applicant respectfully requests that the panel reverse the Examiner's findings and allow claims 12-19 to issue.

2. *The Cited Prior Art Differs From Applicant's Claims*

A. Claims 12 and 16

The Examiner has indicated on pages 2-3 of the Final Office Action that it would have been obvious to one of ordinary skill in the art to use the straps provided by *Powell* to connect the net to the support member provided by *Reynolds* in order to offer a strap that locks to a given diameter and provides additional gripping support with the rubberized sleeve. Applicant respectfully disagrees with the Examiner's conclusion.

Specifically, the combined teachings of *Reynolds* and *Powell* fail to disclose or render obvious Applicant's claims 12 and 16. Applicant's claims 12 and 16 disclose a support member, a plurality of lock fasteners, and a net having a border that are combined to create a net support assembly. This combination of elements is not disclosed in *Reynolds* as combined with *Powell*. *Reynolds* includes two generally vertical posts (20) and (30), a generally horizontal top arm (40), a bottom assembly (50), a safety net (60), and a cable system and

associated hardware. The Examiner has combined these elements with the elongated strap (10), receiving end of the elongated strap (12), the receiving buckle of the elongated strap (22), the middle segment of the elongated strap (18), and the tongue end of the elongated strap (14) in *Powell* to assert that Applicant's claims 12 and 16 are obvious.

The Examiner has equated the *Reynolds* spring snap links (95) to Applicant's lock fasteners. The spring snap links (95) disclosed in *Reynolds* are not similar to Applicant's lock fasteners. Specifically, as shown above in Fig. 1, a spring snap link fastener (95) is made of metal, includes a lever arm that opens using a spring, and has two curved ends. The spring snap link fastener is not designed to permanently lock two items together. Rather, the spring snap links releasably couple items together by using the lever arm.

Further, the spring snap links (95) allow two items to move relative to each other. As in the *Reynolds* invention, the net (60) moves vertically along the posts (20) and (30) from a first position to a second position. (*Reynolds*, Col. 2, lines 57-67). In the first position, the safety net (60) substantially covers an opening defined by the posts (20) and (30), the bottom assembly (50), and the top arm (40). (*Reynolds*, Col. 2, lines 57-59). In the second position, the safety net (60) is out of the way and allows access between the posts (20) and (30) by people or machinery. (*Reynolds*, Col. 2, lines 65-67; *Reynolds* Fig. 2). The net slides along the posts (20) and (30) via the spring snap links (95).

On page 4 of the final office action, the Examiner states that because of the wording "spring snap links, or the like" in *Reynolds*, there is a suggestion that the specific fastener type can be varied as long as it performs the same function as the suggested spring snap links. (Examiner's Final Office Action p. 4). While this statement is true, the fasteners disclosed in *Reynolds* and *Powell* do not perform the same function.

The fastener disclosed in *Powell* is a lock fastener that does not allow items that are bundled together move relative to each other. Rather, this fastener includes a one-way, pull-out resistant locking mechanism that non-releasably secures items together and does not allow movement. Additionally, the fastener described in *Powell* allows locking and binding around a variety of sizes of objects. While *Reynolds* and *Powell* both describe fasteners, they clearly do not perform the same functions. Therefore, the lock fastener in *Powell* is not a proper substitute for the spring snap links in *Reynolds*, meaning that it would not have been

obvious to one of ordinary skill in the art at the time of the invention to combine *Reynolds* and *Powell*.

Moreover, the Examiner has equated the perimeter of the safety net (60) in *Reynolds* with the border disclosed by Applicant. (Examiner's Final Office Action p. 2). The perimeter of the safety net (60) in *Reynolds* is not similar to the border claimed by Applicant. The Applicant claims the border as surrounding the perimeter of the net with warp and weft members extending generally perpendicularly thereto to define spaces therebetween. (Applicant's claims 12 and 16). Additionally, a "border" is defined as "a part that forms the outer edge of something." (The American Heritage Dictionary). This differs from the perimeter of a net. A "perimeter" is defined as "the outer limits of an area." (The American Heritage Dictionary). Applicant's claim specifically discloses that the border *surrounds the perimeter of the net*. The border in Applicant's invention is not merely the outer limit of the net, it is a distinct element that surrounds the entire perimeter of the net.

Further, on page 2 of the final office action, the Examiner indicates that the perimeter of the net (60) of *Reynolds* is stretched along the vertical posts (20) and (30), the horizontal top arm (40), and the bottom assembly (50) and fastened to the vertical posts (20) and (30), the horizontal top arm (40), and the bottom assembly (50). However, as indicated in *Reynolds*, the safety net (60) is *suspended* between the posts (20) and (30), the top arm (40), and the bottom assembly (50) by spring snap links (95). (*Reynolds*, Col. 2, lines 36-38) (emphasis added). To suspend is to hang so as to allow free movement. (The American Heritage Dictionary). *Reynolds* discloses the safety net (60) being suspended because for the invention to work, the safety net (60) must be able to freely move via the spring snap links (95) along the posts (20) and (30), the top arm (40), and the bottom assembly (50). (*Reynolds*, Col. 2, lines 57-67). This operation is different than stretching the border of Applicant's invention along the support member and fastening the border to the support member using the lock fasteners to *lock the border in place*. (Applicant's claims 12 and 16).

Based on the differences in the teachings between *Reynolds* as combined with *Powell* and Applicant's claims 12 and 16, it would not have been obvious to one of ordinary skill in the art at the time the invention was made to combine *Reynolds* with *Powell* to create Applicant's claims 12 and 16.

B. Claims 13 and 17

The Examiner has rejected claims 13 and 17 under 35 U.S.C. §103 based on *Reynolds* in view of *Powell*. Because these are dependent claims that add further limitations to independent claims 12 and 16, respectively, they should be allowed in dependent form because independent claims 12 and 16 are not rendered obvious by *Reynolds* in view of *Powell*. See, *In re Johnson*, 589 F.2d 1070, 1080 (CCPA 1978).

The Examiner indicates on page 2 of the final office action that *Reynolds* shows a safety net being of rectangular shape in Fig. 1 of *Reynolds*. While Fig. 1 of *Reynolds* does show a net in a generally rectangular shape, it does not disclose all of the elements of Applicant's claims 13 and 17.

Specifically, Applicant's claims 13 and 17 disclose a "net having a border which has a generally rectangular shape. . . ." (Applicant's claims 13 and 17). Additionally, Applicant claims that the rectangular shape of the border is "defined by first and second spaced apart long sides extending parallel to one another and first and second short sides each connected to and extending generally perpendicular to the first and second long sides and extending parallel to one another and locating the long sides of said border *flat* against said support member and securing said border to said support member with said lock fasteners." (Applicant's claims 13 and 17) (emphasis added). This differs from the safety system disclosed in *Reynolds*.

The safety system disclosed in *Reynolds* does not have the long sides of a border that is flat against a support member. Rather, as discussed above, *Reynolds* does not include a border, and more importantly, the net (60) in *Reynolds* is not flat against the support members (20, 30, 40, 50). As seen below in Fig. 1 of *Reynolds*, the net includes sag between the spring snap links (95). Additionally, all of the sides of the net (60) disclosed in *Reynolds* are fastened to the support members (20, 30, 40, 50). This differs from Applicant's invention where only the long sides of the border are secured to the support member with lock fasteners. Therefore, *Reynolds* in view of *Powell* does not render Applicant's claims 13 and 17 obvious.

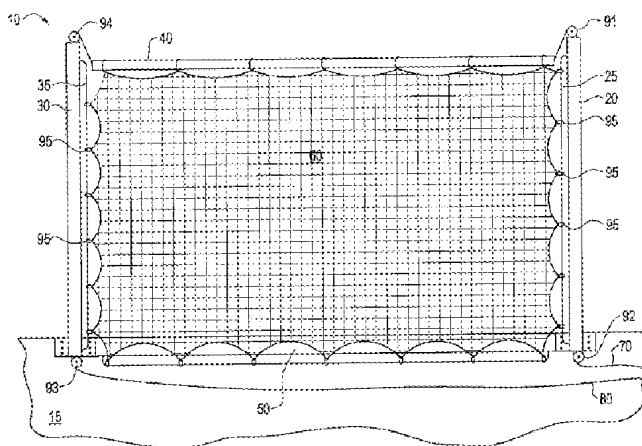


FIG. 1

C. Claims 14 and 18

The Examiner has also rejected claims 14 and 18 under 35 U.S.C. §103 based on *Reynolds* in view of *Powell*. Because these are dependent claims and add further limitations to independent claims 12 and 19, they should be allowed in dependent form because claims 12 and 19 are not rendered obvious by *Reynolds* in view of *Powell*. See, *In re Johnson*, 589 F.2d 1070, 1080 (CCPA 1978).

Applicant's claims 14 and 18 disclose a rubberized sleeve around said lock fastener and the border of the net being clamped about the support element in the region of the rubberized sleeve. However, because there is no border disclosed in *Reynolds*, it cannot be attached to the support member in the region of rubberized sleeves on the lock fasteners. Additionally, claims 14 and 18 further limit claims 13 and 17, respectively. Therefore, because *Reynolds* does not disclose all elements in claims 13 and 17, it cannot disclose all elements in claims 14 and 18. As such, *Reynolds* in view of *Powell* does not render claims 14 and 18 of Applicant's invention obvious.

D. Claims 15 and 19

The Examiner has rejected claims 15 and 19 under 35 U.S.C. §103 based on *Reynolds* in view of *Powell*. Because these are dependent claims and add further limitations to independent claims 12 and 19, they should be allowed in dependent form because claims 12 and 19 are not rendered obvious by *Reynolds* in view of *Powell*. See, *In re Johnson*, 589 F.2d 1070, 1080 (CCPA 1978).

Applicant's claims 15 and 19 disclose that the lock fastener uses a one way latch mechanism to lock the net to the support member. However, because there is no border disclosed in *Reynolds*, a one way latch mechanism on the lock fastener cannot attach to the support member. Additionally, claims 15 and 19 further limit claims 14 and 18, respectively. Therefore, because *Reynolds* does not disclose all elements in claims 14 and 18, it cannot disclose all elements in claims 15 and 19. As such, *Reynolds* in view of *Powell* does not render claims 15 and 19 of Applicant's invention obvious.

CLAIMS APPENDIX (37 C.F.R. 41.37(C)(1)(viii))

1. cancelled
2. cancelled
3. cancelled
4. cancelled
5. cancelled
6. cancelled
7. cancelled
8. cancelled
9. cancelled
10. cancelled
11. cancelled
12. A method of supporting a net along a support member comprising the steps of:
 - providing a support member having a generally elongated extent and having a given diameter;
 - providing a plurality of lock fasteners which have a free end which connects to an opposite end to create a variably constraining diameter when pulled tight;
 - providing a net having a border that surrounds the perimeter of the net with warp and weft members extending generally perpendicularly thereto to define spaces therebetween;
 - stretching said border along said support member and fastening said border member to said support member using said lock fasteners by wrapping said fastener about said net

border and said support member in said spacing and pulling the free end of said fastener through a locking mechanism to lock the fastener in place.

13. A method as defined in claim 12 further characterized by providing a net having a border which has a generally rectangular shape defined by first and second spaced apart long sides extending parallel to one another and first and second short sides each connected to and extending generally perpendicular to the first and second long sides and extending parallel to one another and locating the long sides of said border flat against said support member and securing said border to said support member with said lock fasteners.

14. A method as defined in claim 13 further characterized by providing a rubberized sleeve about said lock fasteners and clamping said border about said support element in the region of said rubberized sleeve.

15. A method as defined in claim 14 further characterized by locking said net to said support member using a one way latch mechanism provided as part of said lock fastener.

16. An apparatus for supporting a net along a support member comprising:

a support member having a generally elongated extent and having a given diameter;

a plurality of lock fasteners which have a free end which connects to an opposite end to create a variably constraining diameter when pulled tight;

a net having a border that surrounds the perimeter of the net with warp and weft members extending generally perpendicularly thereto to define spaces therebetween;

said border being stretched along said support member and fastened to said support member using said lock fasteners by wrapping said fasteners about said net border and said support member in said spaces and pulling the free end of said fastener through a

locking mechanism to lock the fastener in place with the border and the support member.

17. An apparatus as defined in claim 16 further characterized by said net having a border which has a generally rectangular shape defined by first and second spaced apart long sides extending parallel to one another and first and second short sides each connected to and extending generally perpendicular to the first and second long sides and extending parallel to one another and locating the long sides of said border flat against said support member and securing said border to said support member with said lock fasteners.

18. An apparatus as defined in claim 17 and further characterized by a rubberized sleeve being disposed about said lock fasteners and said border being clamped about said support element in the region of said rubberized sleeve.

19. An apparatus as defined in claim 18 further characterized by locking said net to said support member using a one way latch mechanism provided as part of said lock fastener.

EVIDENCE APPENDIX (37 C.F.R. 41.37(C)(1)(ix))

The evidence appended hereto was first entered by the Examiner on page 3 of the first office action dated April 19, 2006. The evidence includes U.S. Pat. No. 6,098,750 issued to *Reynolds* et al. and U.S. Pat. No. 6,138,327 issued to *Powell* et al.

RELATED PROCEEDINGS APPENDIX (37 C.F.R. 41.37(C)(1)(x))

None

Respectfully submitted,

Date: 07/30/2007

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